Supreme Court, U. S.
FILED
JUN 30 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-1507

CHARLES MASCUILLI,

Petitioner,

v.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Respondent,

v.

ATLANTIC & GULF STEVEDORES, INC.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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COUNTERSTATEMENT OF QUESTIONS PRESENTED.

Where the Court of Appeals has affirmed per curiam the decision of the lower court in favor of Respondents, and where there is no significant legal issue involved and no conflict between the circuits on the law applied by the trial judge, and the decision has virtually no precedential effect because of the enactment of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, should not the petition for writ of certiorari be denied.

COUNTERSTATEMENT OF THE CASE.

Petitioner, Charles Mascuilli, a longshoreman, brought this action to recover damages for personal injuries allegedly sustained on July 8, 1970 while he was working at Pier 40, South wharves, Philadelphia. Respondent American Export Isbrandtsen Lines, Inc., is a shipowner, whose vessel, the SS EXECUTOR, was docked at Pier 40, loading and discharging cargo. Respondent joined Mascuilli's employer, Atlantic & Gulf Stevedores, Inc., a stevedoring company engaged to handle the cargo, as third-party defendant.

At approximately 2:00 P. M., Mascuilli was standing on the pier and was struck by dunnage which fell from a forklift truck being driven by a co-worker (App. 21a). The jury found in answer to a special Interrogatory that the dunnage was the property of the shipowner, and had been removed from respondent's vessel earlier that day and placed on the pier by employees of the stevedore.

Petitioner's evidence established that the dunnage was removed from the vessel between 8:00 and 9:00 A. M. that morning bound by lumber bridles, which are two straps each having a choker device which pulls the straps tight as the load is lifted (App. 19a), and that the load was "tight and beautiful" when the dunnage left the ship (App. 56a; Notes of Testimony 102). In addition, petitioner's expert, Captain William Ash, testified that no additional slinging or banding of the dunnage was required before the dunnage was taken off the vessel (Notes of Testimony 458 and 462).

Petitioner sought to establish liability of the vessel owner on the basis of unseaworthiness and negligence. The action was presented to the jury on special Interrogatories, and the jury found, inter alia, that the dunnage belonged to the shipowner, that there was no improper

method of operation used in connection with the dunnage before it was released from the ship's tackle onto the pier, and that shipowner was not negligent with respect to any of the activities which took place before the dunnage was landed on the pier. The jury found that the stevedore's method of operation in handling the dunnage on the pier after it left the ship's tackle was improper, and that the shipowner was negligent in failing to eliminate the stevedore's shoreside improper method of handling the dunnage. The jury also found that the stevedore breached its warranty to the vessel owner to perform its work in a safe, proper and workmanlike manner (App. 45a to 48a).

There was no evidence that the vessel's crew were present on the pier at any time during the day, or that they knew of the stevedore's operation involving the dunnage.

On the basis of these findings the court molded a verdict in favor of the respondent. Petitioner submitted a motion to remold the verdict in his favor, which was denied on August 23, 1974, and he appealed from that Order. The Court of Appeals for the Third Circuit affirmed per curiam the Order of the District Court. This Petition for Writ of Certiorari then followed.

REASONS FOR DENYING THE WRIT.

Petitioner Has Adduced No Legal Grounds Justifying a Review of This Case by This Court.

Petitioner's argument fails to state any legal grounds supporting a review of this case on a writ of certiorari. Petitioner instead has chosen to discuss the merits of the case. He advances the same arguments that he raised in the Third Circuit, which rejected them by affirming the District Court's opinion. The sole purpose of the petition for a writ of certiorari is to seek to have this Court reconsider facts that have already been fully considered.

The trial court was correct in molding a verdict in favor of the shipowner in light of the jury's findings. There is no maritime jurisdiction over this shore-side accident because the instrumentality involved, though the vessel's appurtenance, came from the vessel in perfect condition, and was only thereafter rendered dangerous on account of the stevedore's operations ashore. There was no evidence that the vessel owner controlled these operations, and there is no basis for recovery against the vessel owner either under maritime or diversity jurisdiction. The petition for writ of certiorari should not be granted because there is no significant legal issue involved, no conflict between the circuits regarding existing law, and also because of the statutory changes in the law which was controlling when the case was decided.

This case is basically one decided on its facts. The molding of the verdict by the Trial Judge did not, as petitioner attempts to suggest, invade the jury's province as fact finders, but simply brought their findings into conformity with existing law.

The decision reached in this case does not conflict with *Victory Carriers, Inc. v. Law,* 404 U. S. 202 (1971),

and *Gutierrez v. Waterman Steamship Corp.,* 373 U. S. 206 (1963). As the learned Trial Judge stated in his opinion, the petitioner did not cite and his own research failed to disclose any case supporting the petitioner's contention that *Gutierrez* was applicable, 381 F. Supp. at 774 (A 7-8). The decision, moreover, does not represent an inter-circuit conflict, for the only other case on all fours with this one, *Snydor v. Villain and Fassio et Compania Internazionale Di Genova Societa Reunite Di Naviagaione, S. P. A.,* 459 F. 2d 365 (4th Cir. 1972), supports the result reached by the trial court, 381 F. Supp. at 776-77 (A 13-14).

Finally, the Trial Judge stressed in his opinion that plaintiff could not have recovered on the instant facts under the terms of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901-950, 381 F. Supp. at 776 (A 11-13). Litigation involving facts similar to those of this case and arising from accidents that occurred prior to the enactment of these Amendments is rapidly disappearing. The questions presented by petitioner are thus of diminishing importance. Judge Becker himself stated that his opinion carries "virtually no precedential effect." 381 F. Supp. at 776 (A 13).

CONCLUSION.

Two Courts, after careful consideration, have already rejected the arguments advanced by petitioner. Because this case presents no grounds justifying review by this Court, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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